Filed 6/16/09 Neavill v. California Academy for Liberal Studies CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MATTHEW NEAVILL, Plaintiff and Appellant, v. CALIFORNIA ACADEMY FOR LIBERAL STUDIES et al., Defendants and Respondents.	B207403 (Los Angeles County Super. Ct. No. BC358370)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. White, Judge. Affirmed.

Mark Weidmann and Lee Franck for Plaintiff and Appellant.

Marcin Lambirth, John B. Marcin and Joseph H. Catmull for Defendants and Respondents.

Plaintiff and appellant Matthew Neavill appeals from a judgment following an order granting summary judgment in favor of defendants and respondents California Academy for Liberal Studies (CALS) and Partnership to Uplift Communities (PUC) in this disability discrimination action. Neavill contends: 1) the trial court abused its discretion by sustaining objections to portions of his declaration in opposition to the motion for summary judgment; and 2) there are triable issues of fact as to whether defendants' proffered reasons for terminating his employment were pretextual. We conclude there was no prejudicial error in the evidentiary rulings and Neavill failed to show the existence of a triable issue of fact, and therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Undisputed Facts

PUC is a nonprofit corporation that operates several charter schools, including CALS. Lisa Tremain is the school principal at CALS. CALS hired Neavill to teach tenth grade geometry for the 2004/2005 school year. On his employment application, he noted that he had been convicted of several alcohol-related offenses prior to 1999. He stated that he had stopped drinking in 1999, but this statement was untrue, because he does not abstain from alcohol. Unknown to defendants, Neavill has taken anti-depressant medication for depression since the early 1990s. At times he cannot get up, cannot socialize or engage in activities, cannot function, and has attempted suicide. However, when he takes medication, he usually feels better and can function.

On June 17, 2005, after Neavill had completed his first year at CALS, PUC sent him a letter offering him the geometry position for the next school year. The letter stated that his employment contract would be renewed each year based on his performance and the needs of the school. However, the letter also noted that his employment was at will and either party could terminate the contract at any time. Neavill would receive a two

percent salary increase, because the PUC Board of Directors had approved a two percent increase to the PUC salary scale.

Neavill was required to attend a PUC Summer Institute Program in the first week of August with the other math teachers. PUC Director of Mathematics Instruction Catalina Saenz was in charge of the institute for the math teachers. At the institute, the teachers collaborate to create objectives for the upcoming school year, develop a master plan for the school year, understand the expectations for the math teachers, and create assessment tests and lesson plans before the beginning of the school year. Teachers receive a stipend once they have completed all the tasks of the institute. Saenz assists the teachers in the completion of their work to obtain the stipend and informs the assistant principals and CALS Director of Human Resources Malena Orozco-Otero when a teacher has successfully completed all of the summer institute tasks required to be paid. The leader of a particular site may choose to allow a teacher who has not completed the tasks to teach during the school year.

At the institute, Tremain spoke to the teachers about the low student test scores the previous year and the need to improve scores in the upcoming year. Neavill missed a portion of the institute as a result of illness. On August 9, 2005, Neavill sent an e-mail to Tremain. He stated, "I have really been reflecting on the scores and must tell you that I am wondering if it might be better for the students to have someone else for Geometry this year." He noted that he was personally okay, but it might be better for the kids to have someone else. "At this point, I don't want to start the year if my heart is not into it. If I don't come back, I can bring my laptop, etc. back later this week. I guess the only option to stay with the PUC schools is if there was a middle school slot open[.] I did real well at that grade level with the kids." He asked for her opinion.

The school year apparently began on September 6, 2005. Saenz sent e-mails to Neavill on September 6 and 8, 2005, requesting that he turn in his work from the summer institute so that she could process his stipend.

On September 13, 2005, Neavill executed his employment agreement for the 2005/2006 school year. On Friday, September 16, 2005, Saenz and CALS Assistant

Principal Scott Walker observed Neavill in the classroom. Saenz told Neavill that he was doing a good job and offered suggestions for improvement that he followed.

Neavill missed a portion or all of the workday on Friday, September 23, 2005. His wife found him in a catatonic state when she came home. She called emergency services and he was taken to a hospital in an ambulance. He was hospitalized for severe depression. He was unable to function, could not socialize, could not engage in activities, could barely move, and was suicidal. Neavill called Tremain that day or the next. He explained that he was in the hospital and unsure of his return to work.

On September 27, 2005, Neavill wrote an e-mail to Tremain. He reported that he was back home from the hospital and feeling better, but his doctors had scheduled more tests on September 29 and had not cleared him to return to work until Monday, October 3, 2005. He promised to keep her informed.

On September 28, 2005, Neavill wrote an e-mail to Tremain. He explained that his wife had found him in a non-responsive, non-breathing state. He wished he could tell her more, but his doctor was very strict about information being dispersed. He stated that he was meeting with doctors from Kaiser the following day and hoped they would make a decision.

On Friday, September 30, 2005, Neavill wrote an e-mail to Walker stating that his doctor had cleared him to return to work on Monday. Walker sent an e-mail requesting that Neavill provide documentation from his physician that he was unable to work on September 23, 26, 27, 28, 29, and 30, 2005, and that he is able to return to work beginning October 3, 2005.

Over the weekend, Neavill wrote an e-mail to Tremain and Walker to arrange a meeting with them on Tuesday, October 4, to discuss his medical status. On October 3, 2005, Neavill came to work. He provided a note to Walker from a doctor stating that Neavill had been under his care from September 24 to 26, 2009, and was released to return to work as of October 3, 2009. Neavill told Saenz that he had been out because he had been hospitalized for depression. She said that she would let Tremain know. She sent an e-mail to Neavill stating that she had forgotten to ask him for his weekly lesson

plans, which were referred to as instructional alignment templates (IATs), and requested that he send them to her as soon as he could.

On October 4, 2005, Neavill sent an e-mail to Tremain. He said he had returned to work before he was ready. He had gotten progressively tired during the day on Monday and had been dizzy on Tuesday morning. He believed his medication was not regulated correctly. His doctor had advised him to drink fluids and no caffeine. He wrote that he would "try it again tomorrow" and did not want to be out longer.

At the direction of Orozco-Otero, Tremain sent the following e-mail to Neavill: "Although we are sorry that you are not feeling well, we are asking that you not return to work at this time. We simply cannot continue to have the students without a consistent math instructor. Based on the test scores from last year and the lack of instruction in your classes this year, we feel it's time for a serious conversation regarding your employment at CALS. [¶] As you know, it's necessary to prioritize the students' learning opportunities. So far this year, the students have been missing out on quality instruction in Geometry. We will be placing another teacher in your classroom until further notice. Please email or call the school to set up an appointment with [Walker] and I."

Neavill quickly responded by e-mail: "I am diagnosed with a disorder that is covered under the Americans with Disabilities Act and must remind you that I am under a doctor['s] care. I gave originals of my doctor['s] note to Mr. Walker upon returning on 10/3. Since I am under contract, I will be consulting with my attorney today. If in fact the reason I am being dismissed is because of low test scores from last year then I should have never been offered a contract. Any further communication to you will be done through my attorney." The e-mail was sent to Orozco-Otero and others as well.

On October 6, 2005, Orozco-Otero sent an e-mail to Neavill. She stated that Neavill had misunderstood Tremain's e-mail and he had not been dismissed. She clarified that they needed to have a discussion with him before he could return to the classroom. She noted that he had been absent for 8 of the 20 days of the school year. She explained that Neavill had a discussion with Tremain over the summer in which she told him that the test scores from the previous year were not where they needed to be.

CALS asks teachers to have substitute plans ready and turn in IATs weekly. She stated that Tremain had emphasized the importance of these plans again on September 13, 2005. She stated that when Neavill was out, he did not leave substitute plans or IATS, and therefore, the school had no knowledge of what the students should learn next. She noted that he had not requested any special accommodations, but if he needed accommodations, they were willing to discuss them. He had turned in his key card and taken his belongings, so she asked if he was resigning.

On October 6, 2005, Neavill sent Orozco-Otero an e-mail accusing her of retaliation on the basis of his disability, medical leave, and request for accommodation. He stated that all the time he had taken off was medical leave necessary to treat his disability. He said he had told her that he suffered from depression and was being treated by a doctor. He stated that he had requested accommodations at work. Specifically, medical leave was an accommodation request for his depression. In addition, he needed an accommodation allowing him to take breaks on occasion due to his medication.

Neavill stated that he had always maintained his IATS and Tremain never discussed any problem about them with him. His test scores were fine and there had never been a problem with his test scores. He had been told over the summer that his test scores were fine and that he was well liked as a teacher. On this basis, he was offered another contract.

He had not resigned, nor did he plan to resign. What he wanted was to work in a nondiscriminatory, nonretaliatory environment. However, he stated that immediately after he told Tremain that he was sick from depression and required a day of medical leave to continue with his treatment, she told him not to return to work. He stated his belief that he had been terminated because he was not being allowed to return to work. He asked Orozco-Otero to inform him as to her plans for the meeting the following week. He requested an end to the discrimination and retaliation against him.

On October 7, 2005, Walker sent an e-mail to Orozco-Otero that discussed significant concerns he had based on his observations of Neavill's class. He stated that he had not had an opportunity to discuss the issues with Neavill because of his absences.

One of Walker's major concerns was that there was no planning document available to compare with the observed instruction in order to evaluate whether Neavill's instruction aligned to his plans.

On October 13, 2005, Orozco-Otero responded to Neavill's e-mail. She stated that no one had been aware that he was being treated for depression. Neavill's prior e-mails to Tremain and Walker had simply stated that his doctor preferred him not to reveal his condition. They had known only that he was sick and his doctors were running tests to determine his condition. They believed he had improved, because his doctor released him to work on October 3, 2005. She noted that he had never requested medical leave verbally or in writing. However, they were willing to grant him a medical leave if he needed it and could give them appropriate certification from his doctor regarding the need for leave. They had not been aware that he needed any type of accommodation and if he required reasonable accommodations, they would be happy to discuss his needs and determine whether they could accommodate them.

She stated that Tremain confirmed Neavill turned in only two IATs and his work to Saenz had been late or incomplete. He failed to leave lesson plans. She stated that it was well documented that his test scores were not fine. His students had tested one percent proficient and zero percent advanced. When he spoke to Saenz and Tremain in August, he assured them that his performance would improve. However, his performance to date had not demonstrated that he was working toward improving the students' test scores. Tremain and Walker needed to speak to him prior to his returning to the classroom to ensure that he understands the responsibilities and requirements of a math teacher and is willing to commit to providing quality instruction. She stated that they could discuss whether he needed support or other resources and they wanted to assist him in improving his performance.

Orozco-Otero, Tremain, Walker, and Saenz met with Neavill on October 14, 2005. Orozco-Otero made the decision to terminate Neavill during the meeting. Orozco-Otero wrote a letter to Neavill on October 17, 2005, "to confirm the outcome of our meeting on October 14, 2005." The letter stated: "The purpose of our meeting was to discuss with

you CALS' requirements of all teachers and your lack of performance. [¶] During our meeting we spoke to you about your performance this year. You told us you believe that your current performance is fine and that you will not change anything should you return. We informed you that your current performance is not acceptable and we would be willing to provide you with any resources you thought you needed to help you achieve better results. You confirmed you didn't feel the resources were needed since you thought you were being effective with your current performance. We offered you thirty days in which we would work with you and you declined our offer reiterating you would not change the way you were teaching. [¶] As we agreed, because of our need for you to improve your performance and your refusal to improve your performance it is better to part ways since you are not willing to follow the standard requirements. We are terminating you effective October 17, 2005 for failure to meet your contractual obligations and meeting the federal and state laws requiring us to implement methods that will improve our students' test scores."

Allegations of the Complaint

On September 12, 2006, Neavill filed a complaint against CALS, PUC, and Tremain[1] for disability discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). The complaint stated that he suffered an adverse employment action because of his physical and mental disabilities, including depression. In addition, he suffered an adverse employment action in retaliation for his request for reasonable accommodation and complaints about disability discrimination.

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1 Neavill dismissed the complaint as against Tremain.

Motion for Summary Judgment and Supporting Evidence

CALS and PUC filed a motion for summary judgment on the grounds that: (1) Neavill could not establish discriminatory intent, because CALS and PUC did not learn of his disability until after the adverse employment action that led to his termination; (2) CALS and PUC had a legitimate business reason for terminating Neavill based on his poor performance; and (3) Neavill did not request accommodation. In support of its motion, CALS and PUC submitted the following additional evidence.

Neavill testified in his deposition that he spoke to Tremain at the summer institute about his students' low test scores in math the prior year. Neavill knew he needed to improve the test scores in the new school year.

Orozco-Otero stated in a declaration that she had the sole decisionmaking authority with regard to Neavill's employment. She asked Tremain to send an e-mail to Neavill on October 4, 2005, requesting that he not return to work, because he had missed approximately 10 of the first 20 days of the school year, had not turned in lesson plans or substitute lesson plans as required by school policy, and had performed poorly the previous year, which he had been spoken to about. Orozco-Otero felt it was imperative that Neavill not return to the classroom without first agreeing to basic matters.

Orozco-Otero testified at her deposition that Neavill attended only two of the five training days of the summer institute. At the start of the school year, Neavill had not turned in assessment tests that he was required to create to evaluate the students' performance. He had not turned in a master plan describing how he was going to meet the state standards and improve his students' proficiency in geometry. Substitute lesson plans are a requirement of the school and of Neavill's employment, but he did not turn in the required 10 days of substitute lesson plans for use in his absence. Neavill failed to turn in IATs, which were required to be turned in on the first school day of each week. Tremain stated in her deposition that Neavill had not provided a substitute lesson plan for any of the days that he was absent.

Orozco-Otero declared that no one terminated Neavill's employment prior to the October 14, 2005 meeting, and she did not enter the meeting with the intent to terminate him. She suggested a 30-day evaluation period with monitored supervision to assess his progress. Under her proposal, they would meet again in 30 days to review whether he had been absent and had submitted substitute and weekly lesson plans. Neavill refused to consider these conditions. He repeatedly stated that his teaching philosophy and the school's did not match and it would waste everyone's time to meet again in 30 days because he was not going to change. He would not change his teaching methods to meet the state standards. He stated that he was going to continue working in the same manner that he always had, would not change anything and would not agree to any conditions on his employment. Orozco-Otero decided that the school could not keep a teacher who would not agree to comply with school policies or accept a degree of monitored supervision to make sure he was on track. She made the decision to terminate him at that point. In her deposition testimony, Orozco-Otero stated that she made the decision to terminate Neavill based on his insubordination in the meeting, his failure to follow policies and procedures, his failure to comply with his contract, and his failure to make attempts to improve his teaching methods for the benefit of the students.

Orozco-Otero declared that Neavill's disability was not a factor in her decision to terminate his employment. In addition, Neavill never provided medical corroboration of disability, nor did he provide medical reasons for his absences and inability to perform his job duties as required.

Opposition to Motion for Summary Judgment and Supporting Evidence

On November 29, 2007, Neavill filed an opposition to the motion for summary judgment on the grounds that there were triable issues of fact as to discriminatory intent and retaliation, based on 1) the proximity between CALS and PUC's knowledge of Neavill's protected status and complaints of discrimination and their termination of his

employment, 2) the falsity of the reasons given for his termination, and 3) the lack of documentation of performance problems, contrary to CALS' policies.

Neavill submitted his declaration stating the following additional facts. At the end of his first year of teaching at CALS, Tremain told him that he had done a good job and she wanted him to come back for the following school year.

Saenz had discussed the list of teacher performance standards from the institute with Neavill and confirmed that he met the requirements. He had completed all of the tasks required of the summer institute and received the stipend payment.

At the meeting on October 14, 2005, Tremain told Neavill for the first time that his performance was poor, his students' test scores were too low, and he had not turned in work from the summer institute. Neavill said that he had performed well, Tremain knew the test scores when he was offered a new contract and had not had a problem with them, and he had completed the summer institute work and received the stipend. Neavill began to discuss reasonable accommodations, but he was cut off and informed of performance problems. Orozco-Otero told him at the meeting that his employment was terminated.

Neavill declared that he had turned in the required forms for math expectations, turned in all required assessments, turned in all required master plans, and prepared all required tests. He had turned in required substitute plans and weekly lesson plans in early September 2005. He had missed one of the training sessions at the summer institute because he was sick, which was an accepted excuse. In his opinion, he was never insubordinate, never failed to follow policies, never failed to attempt to improve his teaching methods, and never failed to comply with his contract.

He submitted Tremain's deposition testimony. She said that she had been confused by Neavill's October 4, 2005 e-mail and had discussed it with Orozco-Otero. Tremain told Orozco-Otero that she was unaware that Neavill had a disability. She had not intended to terminate him when she sent the e-mail asking him not to return to his classroom. She asked Orozco-Otero for advice as to how to proceed. Orozco-Otero said she did not know of any disability that Neavill had either. She said that she would handle the matter from that point forward, because it was a human resources issue. In another

conversation, Orozco-Otero told Tremain about the meeting set for October 14, 2005. She explained that she would start the meeting by asking about Neavill's disability and asking about any accommodations he needed.

He submitted Orozco-Otero's deposition testimony stating that she began working for PUC in 2005. She instituted a policy in the beginning of the school year in September 2005, asking principals to prepare a written document any time that they verbally counseled a teacher about a job performance problem.

Reply and Trial Court Ruling

Defendants filed a reply on December 6, 2007, on the grounds that the evidence showed Tremain told Neavill not to return to work prior to learning that he had a disability and he could not raise his disability to insulate him from a job action that was already taking place. Defendants also filed objections to the declarations of Neavill and his wife. A hearing was held on December 13, 2007. The trial court sustained defendants' evidentiary objections. The court found no triable issue of fact as to whether defendants' reasons for the termination were pretextual, because defendants did not learn of Neavill's protected disability status until after Neavill was told not to return to work. On February 27, 2008, the court entered an order granting summary judgment in favor of defendants and a judgment of dismissal. Neavill filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

On appeal after an order granting summary judgment, we review the record de novo to determine whether triable issues of material fact exist. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We consider all of the evidence submitted in connection with summary judgment, except evidence to which objections have been

sustained and not challenged on appeal. (*Ibid*.) "A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken. [Citation.] [¶] 'Personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations. [Citations.] [¶] 'The affidavits must cite evidentiary facts, not legal conclusions or "ultimate" facts. [Citation.] [¶] 'Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits. [Citation.]'" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119-1120.)

"We view the evidence in a light favorable to, and resolve any evidentiary doubts or ambiguities in favor of, the nonmoving party. [Citation.] The moving party bears the burden to demonstrate 'that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.' [Citation.] If the moving party makes a prima facie showing, the burden shifts to the party opposing summary judgment 'to make [its own] prima facie showing of the existence of a triable issue of material fact.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.)

"[A]ny determination underlying the order granting summary judgment is reviewed under the standard appropriate to that determination. [Citation.]" (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) A trial court's ruling on the admission or exclusion of evidence submitted in connection with a motion for summary judgment is reviewed for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679-680; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) It is the appellant's burden to establish an abuse of discretion, "which we will find only if the trial court's order exceeds the bounds of reason. [Citation.]" (*DiCola v. White Brothers Performance*

Products, Inc., *supra*, at pp. 679-680.) We will not disturb the trial court's exercise of discretion unless it appears there has been a miscarriage of justice. (Evid. Code, § 354.)

II. Evidentiary Objections

Neavill contends the trial court abused its discretion by sustaining objections to several portions of his declaration on the grounds that his statements lacked foundation and were conclusory. We conclude that either the objections were properly sustained, but if not, no miscarriage of justice occurred in light of the cumulative nature of the evidence.

A. Satisfactory Job Performance

Neavill contends the trial court abused its discretion by excluding his statements that he never received any written warnings about his job performance, was never informed that he was doing an unsatisfactory job, and up until October 14, 2005, Saenz, Walker, and Tremain had said only that he was doing a satisfactory job.

The trial court did not abuse its discretion by excluding the evidence, because it lacked foundation. Neavill provided no specific dates as to any conversations with Saenz, Walker, or Tremain in which they told him he was doing a satisfactory job. Moreover, the e-mail message that Tremain sent prior to October 14, 2005, and which Neavill acknowledges he received, stripped him of his job responsibilities. It did not tell him that he was doing a satisfactory job. Neavill cannot simply declare otherwise.

Even were we to conclude that the trial court abused its discretion by excluding this portion of Neavill's declaration, any error was harmless. It is clear from the undisputed facts that Neavill did not receive written warnings or verbal counseling about poor job performance until the messages received via e-mail in September 2005. It is also clear that the administration did not tell him that he was performing unsatisfactorily prior to September 2005, but that he was aware of his responsibilities as a teacher, knew

the students' test scores from the prior year were too low, and was aware that the scores needed to improve in the 2005/2006 school year.

B. $1,000 Stipend

Neavill contends the trial court abused its discretion by excluding his statement that he had completed all of the tasks of the summer institute and received the stipend of $1,000. Assuming this ruling was an abuse of discretion, any error was harmless, because the evidence was cumulative of several statements in Neavill's declaration that he completed the tasks and received the stipend, which were not objected to by defendants.

C. Discussion with Tremain Concerning His Job Performance

Neavill contends the trial court abused its discretion by excluding the following statements from his declaration: When he expressed concern about his students' low test scores, Tremain reassured him that many of the classes had low scores because the students came from disadvantaged backgrounds, spoke English as a second language, and had difficulty learning. She showed him the test scores of the algebra students taught by Walker the previous year. The scores were low, similar to the scores for Neavill's geometry class. Walker was promoted to vice-principal. Tremain said Neavill was doing a good job and should try to do the best he could with the students.

The trial court did not abuse its discretion by excluding these statements, because Neavill failed to provide any foundational information as to when or where this conversation took place.

Even if the statements should have been admitted, no miscarriage of justice occurred as a result of the exclusion of this evidence. Regardless of the challenges facing the children, all of the parties agreed that the school's goal for the 2005/2006 school year was to make an effort to improve the scores. The school's concern was with Neavill's

September 2005 lack of effort and instruction to improve the scores over the previous year. The other teacher's low scores from the prior year were irrelevant, because that employee was not teaching in the 2005/2006 school year and so there could be no evidence from which to compare the efforts made to improve scores in the other classroom with Neavill's performance.

D. Depression

Neavill contends the trial court abused its discretion by excluding his statement that his absences during the school year were due to depression, for which he was hospitalized. The court did not abuse its discretion, because Neavill provided no foundation for his statement. He failed to state the dates of his absences and failed to provide specific information from which to conclude that he had been diagnosed with depression as to those dates. Moreover, any abuse of discretion was harmless, because the evidence was cumulative.

E. Standard

Neavill contends the trial court abused its discretion by excluding statements in his declaration that there was no standard set for the students' scores and management discussed improving the scores in many subjects at faculty meetings, because they were low. The court did not abuse its discretion, because there was no evidence as to when the faculty meetings occurred or who made the statements. Even were we to conclude that the statements should have been admitted, their exclusion was harmless. It is clear from the undisputed evidence that "improvement" was the administration's goal and not a particular score.

III. FEHA

Neavill contends there are triable issues of fact as to whether the proffered reasons for his termination were pretextual, and therefore, triable issues of fact existed as to his causes of action for discrimination and retaliation. We disagree.

"[The FEHA] prohibits discrimination based on an employee's physical disability. Under the FEHA, it is unlawful '[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition . . . of any person, . . . to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.' [Citation.]" (*Green v. State of California* (2007) 42 Cal.4th 254, 262.)

"[The] FEHA proscribes two types of disability discrimination: (1) discrimination arising from an employer's intentionally discriminatory act against an employee because of his or her disability (referred to as disparate treatment discrimination), and (2) discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees suffering from a disability (referred to as disparate impact discrimination). (*Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 128-129.) In opposing summary judgment, plaintiff asserted only disparate treatment discrimination." (*Avila v. Continental Airlines, Inc., supra,* 165 Cal.App.4th at p. 1246.)

"To establish a prima facie case for disparate treatment discrimination, plaintiff must show (1) he suffers from a disability, (2) he is otherwise qualified to do his job, (3) he suffered an adverse employment action, and (4) the employer harbored discriminatory intent. [Citations.] 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer.' [Citations.]" (*Avila v. Continental Airlines, Inc., supra,* 165 Cal.App.4th at pp. 1246-1247.) "'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable

interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." [Citations.]' [Citation.]" (*Avila v. Continental Airlines, Inc.*, *supra*, 165 Cal.App.4th at p. 1248.)

"[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation '"'drops out of the picture,'"' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

The evidence submitted by CALS and PUC showed there were legitimate, nondiscriminatory reasons for Orozco-Otero's decision to terminate Neavill's employment. CALS informed its teachers over the summer of the importance of improving the students' test scores. Neavill missed a day of training due to illness. Following these discussions, Neavill expressed ambivalence about the position. He did not demonstrate that he was prepared for the new school year by turning in his assessment test and master plan prior to the start of, or at the beginning of, the school year. He did not turn in timely weekly lesson plans and substitute lesson plans as required by school policy. A little more than two weeks after the start of the school year, he either called in sick or simply did not appear for work and there were no lesson plans for substitute teachers to use to teach the children. Upon his return, he provided an inadequate physician's note that did not excuse all of the days of work that he had missed. The physician's note stated that he was released to return to work as of October 3, 2005, and did not indicate that Neavill had any work conditions or restrictions. Despite this, Neavill failed to appear for work on October 4, 2005. He sent an e-mail that indicated his attendance might continue to be sporadic. Neavill's performance in the first

month of the school year was undeniably detrimental to the children's needs for consistent, effective teaching, and failed to provide the level of instruction needed to improve test scores. The school principal communicated the serious nature of his performance issues and took disciplinary action in her e-mail on October 4, 2005. Tremain told Neavill that his inconsistency was detrimental to the student's learning and their test scores could not be improved with the lack of instruction taking place in his class. She stripped him of his job responsibilities and asked him to set up an appointment for a "serious conversation" regarding his employment at CALS. The only reasonable inference is that the school required some assurance the situation would change, and absent such assurance, Neavill would not be allowed to resume his position. Tremain took these measures without any knowledge that Neavill had a disability.

Neavill revealed that he had a disorder only after being stripped of his job duties and notified that the lack of instruction in his classroom was unacceptable. Orozco-Otero responded that the school would provide him any reasonable accommodation. If he needed medical leave for a disability, it would be granted. He simply needed to provide certification from his doctor regarding the need for leave. They would also accommodate other reasonable needs. However, at the meeting to discuss his employment, Neavill did not suggest any accommodation was necessary to perform his job. Orozco-Otero offered to give him a month to improve his performance. All that was requested of him was to perform his job by coming to work and submitting weekly and substitute lesson plans on time. He refused to agree to this proposal. Orozco-Otero's decision to terminate Neavill was based on his frequent unexplained absences, failure to turn in timely work, and refusal to agree to perform the basic requirements of his job for a month. CALS and PUC clearly demonstrated legitimate business reasons for Neavill's termination.

Neavill contends a triable issue of fact as to whether his termination resulted from discrimination and retaliation is shown by: 1) evidence that he was performing competently; 2) the proximity between CALS and PUC's knowledge of his disability and his termination; and 3) CALS and PUC's failure to follow their own policies concerning documentation of performance problems. We conclude the evidence that

Neavill submitted in opposition to the motion failed to raise a triable issue of material fact that the reasons given for the termination were false.

Neavill's evidence did not dispute the performance issues raised by CALS and PUC. Neavill declared that he turned in all his work, but he did not specify when he turned in work or provide other specific evidence. He did not show that his work was prepared and submitted in a timely manner. Neavill's evidence does not refute the school's evidence that they did not have a student assessment test or a master plan from him at the beginning of the school year. His evidence fails to refute the school's evidence that substitute teachers in his classroom did not have access to substitute lesson plans at the time that the plans were needed. He did not dispute that he missed multiple days of work and several of his absences were not excused by a physician's note. He did not dispute evidence that he had missed 8 of the first 20 days of instruction. Neavill's evidence did not raise a triable issue of fact as to CALS and PUC's reasons for his termination; namely, his failure to turn in work in compliance with school policy and the lack of consistent instruction in his classroom as a result of his absences and failure to provide substitute lesson plans for use when they were needed.

The proximity of Neavill's disclosure of disability and his termination were not evidence of pretext under the circumstances of this case. CALS and PUC implemented an adverse employment action based on perceived problems with the level of instruction in his classroom without any knowledge that he had a disability. Neavill was stripped of his job duties, told that the lack of instruction in his classroom was unacceptable, and asked to make an appointment to discuss the future of his employment at the school. In response to this adverse action, Neavill did not request any accommodation or resources to assist with the issues raised by the school, did not present any specific evidence to dispute the school's records, and refused to comply with the basic requirements of his job for a 30-day evaluation period to confirm that he was performing competently. The mere proximity in time between his revelation that he suffered from a disability and his termination did not raise an inference of discrimination or retaliation under these circumstances, because the revelation was merely interjected between the initiation of

disciplinary action and the inevitable conclusion of that disciplinary action in the absence of any assurance that the consistency of the instruction in his classroom would increase. Proximity evidence alone does not raise an inference of discrimination in this context.

Neavill's evidence also did not show that CALS or PUC failed to comply with the policy requiring site leaders to document verbal counseling of a teacher about job performance problems. The policy was instituted at the beginning of the school year in September 2005. There was no evidence that Tremain spoke to Neavill about job performance problems after the policy was instituted. She and Orozco-Otero sent him e-mails counseling him in writing on the deficiencies of his performance. Therefore, there was no verbal counseling that Tremain failed to document and there was no failure to comply with internal policies. The trial court properly concluded there was no triable issue of fact presented in this case.

DISPOSITION

The judgment is affirmed. Respondents California Academy for Liberal Studies and Partnership to Uplift Communities are awarded their costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.